FOO SOOK LIN & ANOR v. FOO FATT HIN & ORS

HIGH COURT MALAYA, IPOH
HARMINDAR SINGH DHALIWAL J
[CIVIL SUIT NO: 22NCVC-5-01-2014]
4 SEPTEMBER 2014

SUCCESSION: *Probate – Testamentary capacity – Creation of will – Whether deceased had testamentary capacity – Whether suspicious circumstances existed surrounding making of will – Undue influence – Whether there was pressure such as to coerce testator – Whether testator at all material times had unimpaired mental capacity*

One Foo Khoon Leong ('the deceased') passed away at 103 years old due to old age and left a will made in 2011 ('the will') which superseded five earlier wills. The son of the deceased, Foo Fatt Hin ('the first defendant') was named as the executor of the will and duly obtained probate at the Ipoh High Court in 2013. The beneficiaries under the will were the two plaintiffs and the four defendants. The first plaintiff was the eldest daughter while the second plaintiff was the son of another daughter (grandson) of the deceased. The second to fourth defendants were the children of the first defendant and grandchildren of the deceased. The first plaintiff later withdrew her action, leaving the second plaintiff ('the plaintiff') to continue with the trial. The facts showed that after the deceased had started to live with the first defendant and his wife, there was a gradual and significant reduction in the plaintiff's share of the deceased's property in the will compared to the earlier wills, from initially one third share in the estate to a sum of RM2.5 million to a sum of only RM10,000. On the other hand, there was a gradual and significant increase of the share of the first defendant and his children in the deceased's property. Unhappy with what was provided in the will, the plaintiff filed the action for, *inter alia*, (i) a declaration that the will was null and void; (ii) the grant of probate to be set aside; and (iii) various other prayers in relation to the estate of the deceased. The three main issues for deliberation by the court were (i) whether the deceased had testamentary capacity in the creation of the will; (ii) whether there were suspicious circumstances surrounding the making of the will or the wills that came before it; and (iii) whether undue influence was exerted upon the deceased in the creation of the will or the previous wills.

Held (dismissing claim with costs):

(1) The defendants had more than sufficiently shown that the deceased had the mental capacity to make the will. The evidence disclosed that the deceased was in good mental health and was certainly not suffering from any delusion or disorder of the mind. It was significant that the deceased did not have any history of any mental illness and the evidence overwhelmingly showed that he was rational and aware of his surroundings at the time of the making of the will and even well after

A he had done so. When there was no history of mental illness or lack of mental capacity, the presence of medical practitioners to confirm the mental capacity was not mandatory or necessary and was only desirable for the sake of minimising disputes and not as a touchstone of validity. (paras 10, 12 & 13)

B **(2)** There were no suspicious circumstances in the making of the 2011 will or the previous wills as alleged by the plaintiff. It would invite some scrutiny if the deceased had given his property to a complete stranger and not the persons who had looked after him. It was the deceased who chose to live with the first defendant. There was nothing sinister in this C as the first defendant was the son of the deceased and he and his wife were in a position to look after all his needs. There was no evidence whatsoever that the deceased was unhappy with this arrangement. The deceased might have felt indebted to the first defendant's family and intended to provide for them. This could not by a stretch equate to D suspicious circumstances. It was noteworthy that the deceased had appointed his solicitor independently of any of the beneficiaries in all his dealings and was also able to independently give instructions to his solicitor. The deceased was well able to handle his own personal matters like signing cheques, giving instructions to the bank, payment of income tax and making a police report. The deceased was not in such a state of E dependency that he could not act of his own free will and mind. By all accounts, the deceased appeared to be a strong-willed person with a mind of his own. (paras 20, 21, 24, 26 & 27)

(3) Considering all facts and circumstances, the court was satisfied that the F deceased at all material times had unimpaired mental capacity and was independent in his thinking despite his advanced age. It was highly likely that the deceased might have felt a sense of gratitude to the first defendant and his family for their kindness in looking after him but it could not follow that this amounted to undue influence. Undue influence must involve some kind of pressure or influence such as to coerce the G testator into doing that which he does not desire to do. (paras 31 & 32)

(4) It must be appreciated that the court was not concerned with the fairness of the will. It was not the function of the court to ensure that a will was fair, equitable or just. It was up to a testator as to how he intended to H dispose of his property so long as he acted with full comprehension of what he was doing. (para 34)

Case(s) referred to:

Banks v. Goodfellow (1870) LR 5QB 549 ***(refd)***

Choo Mooi Kooi v. Choo Choon Jin & Other Cases [2012] 3 CLJ 477 HC ***(refd)***

I *Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC* ***(refd)***

Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 1 LNS 340 HC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Lim Kang Hai & Ors v. Lim Chik Lock [2013] 1 LNS 539 HC ***(refd)***
Motibai Hormusjee v. Jamsetjee AIR 1924 PC 28 PC ***(refd)***
Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 CA ***(refd)***
Udham Singh v. Indar Kaur [1971] 1 LNS 144 FC ***(refd)***

For the 2nd plaintiff - Chan Kean Li (Lim Poh Leong, Yap Kok Kheong & Edwin Siebel with him); M/s Gibb & Co
For the defendants - Choy Kam Lee (Awtar Kaur with him); M/s KL Choy & Co

Reported by Lyana Shohaimay

JUDGMENT

Harmindar Singh Dhaliwal J:

[1] One Foo Khoon Leong ("the deceased") passed away on 29 September 2013. He was 103 years old. His death certificate stated that he died of old age. He left behind a will dated 15 July 2011. This will superseded five earlier wills. This last will ("the will") was witnessed by a senior advocate and solicitor Mr S A Lingam and his clerk Madam Leela Arul (DW2). The son of the deceased, Foo Fatt Hin ("first defendant"), was named as executor. The first defendant duly obtained probate on 16 December 2013 at the Ipoh High Court.

[2] The beneficiaries under this will were the two plaintiffs and the four defendants. The first plaintiff is the eldest daughter of the deceased. The second plaintiff is the grandson of the deceased. He is the son of another daughter of the deceased, Madam Foo Sook Chin. The second, third and fourth defendants are the children of the first defendant and the grandchildren of the deceased.

[3] The plaintiffs were not happy with what was provided in the will. They have now filed this action for amongst other things, to declare the will of 15 July 2011 as null and void and for the grant of probate to be set aside. They are seeking for the will dated July 2001 to be declared as the last will and testament of the deceased. They are also seeking various other prayers in relation to the estate of the deceased. On the eve of the trial, the first plaintiff withdrew her action against the defendants leaving only the second plaintiff to continue with the trial. For convenience the second plaintiff will from hereon be referred to as the plaintiff.

[4] The plaintiff's main complaint with the will appeared to be that there was a gradual and significant reduction in his share of the deceased's property from 2001 until 2011. That this was indeed the case is not disputed and in any event can be summarised in the table as follows:

No.	Will	Beneficiaries	Executors
1.	Will dated July 2001	In equal shares to: 1. Foo Fatt Hin; 2. Foo Sook Lin; and 3. Foo Sook Chin and in event she pre-deceases then to Richard Foo.	a. Foo Fatt Hin; b. Foo Sook Lin; and c. Richard Foo
2.	Will dated 15/1/2008	In equal shares to: 1. Foo Fatt Hin; 2. Foo Sook Lin; and 3. Richard Foo	Foo Fatt Hin
3.	Will dated 14/3/2008	1) RM 2.5milion to Richard Foo; and 2) The remainder to Foo Fatt Hin	Foo Fatt Hin
4.	Will dated 19/3/2008	1) RM 2.5milion to Richard Foo; and 2) The remainder to Foo Fatt Hin. In event Foo Fatt Hin predeceases, then the remainder goes to: Arthur - 1/2 Ruby - 1/4 Winnie - 1/4	Foo Fatt Hin
5.	Will dated 31/5/2010	1) RM 2.5milion to Richard Foo; and 2) The remainder to Foo Fatt Hin. In event Foo Fatt Hin predeceases, then the remainder goes to: Arthur - 1/2 Ruby - 1/4 Winnie - 1/4	Foo Fatt Hin. In event Foo Fatt Hin predeceases, then: Arthur; Ruby; and Winnie
6.	Will dated 15/7/2011	1) RM10,000 to Richard Foo; 2) RM 1,000 to Foo Sook Lin; and 3) The House no. 104A to Arthur; and 4) The remainder to Arthur - 50% Fatt Hin - 25% Ruby and Winnie - 12.5%	Foo Fatt Hin- In event Foo Fatt Hin predeceases, then: Arthur; Ruby; and Winnie

[5] In essence, in the original will created in July 2001, the deceased testator had bequeathed that his property be distributed equally among his children with the condition that if Madam Foo Sook Chin had predeceased him, then her son the plaintiff will be entitled to her share. The next will came about in January 2008 with the plaintiff now having a one-third (1/3) share in the deceased's estate after the death of his mother Madam Foo Sook Chin. After the deceased testator started living with the first defendant and his wife, SD4, four (4) subsequent wills were created from the year 2008, wherein there had been:

(a) A change in naming the first defendant's children (the second, third and fourth defendants) as beneficiary(s) and/or executor(s)/executrix(s);

(b) A gradual and significant increase of the share of the first defendant and his children (second, third and fourth defendants) in the deceased testator's property; and

(c) A gradual and significant reduction of the share of the plaintiff in the deceased testator's property from initially one-third share in the estate to a sum of RM2.5 million and finally a sum of only RM10,000.

[6] Arising from this factual narrative, three grounds are being relied on by the plaintiff to succeed in his claim, which grounds have now become the issues for deliberation and decision by the court. The issues can be conveniently stated as follows:

(i) Whether the deceased had testamentary capacity in the creation of the will dated 15 July 2001 ("issue of testamentary capacity");

(ii) Whether there exist suspicious circumstances surrounding the making of the will of 15 July 2011 and the other wills dated 15 January 2008, 14 March 2008, 19 March 2008 and 31 May 2010. ("issue of suspicious circumstances"); and

(iii) Whether undue influence was exerted upon the deceased in the creation of the 2011 will as well as those dated 15 January 2008, 14 March 2008, 19 March 2008 and 31 May 2010. ("issue of undue influence").

Issue Of Testamentary Capacity

[7] It is settled law that for a will to be valid, there must be testamentary capacity on the part of the testator. Where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will (*Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19).

[8] On the issue of testamentary capacity, the leading case is that of *Banks v. Goodfellow* (1870) LR 5 QB 549 where Cockburn CJ stated (at p. 565):

> It is essential to the exercise of such power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[9] The case of *Banks v. Goodfellow* has been followed by the Malaysian Courts, for example by the Federal Court in *Udham Singh v. Indar Kaur* [1971] 1 LNS 144; [1971] 2 MLJ 263; and by the Court of Appeal in *Lee Ing Chin, supra* which decision was affirmed by the Federal Court (*Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[10] In this connection and after careful consideration, I have come to the view that the defendants have more than sufficiently shown that the deceased testator in the instant case had the mental capacity to make the will. The evidence disclosed that the deceased was in good mental health and was certainly not suffering from any delusion or disorder of the mind. The will was also witnessed by a senior legal practitioner Mr S A Lingam who I am sure would not have prepared and witnessed the will if he did not think that the deceased had sufficient mental capacity. Mr S A Lingam did not give evidence as he had passed on prior to trial but he had on 10 October 2013 affirmed an affidavit verifying the will of 15 July 2011. In this affidavit the solicitor confirmed that the contents of the will were explained to the deceased and that the deceased was fully aware, of sound mind and understood the contents of the said will. The solicitor also affirmed a statutory declaration dated 10 February 2014 setting out the circumstances under which the said will came to be prepared which I will deal with when considering the other issues.

[11] The plaintiff nevertheless contends that considering the age of the deceased, the presence of medical practitioners at the signing of the will was imperative in keeping with the "golden rule" as was accepted in the case of *Lim Kang Hai & Ors v. Lim Chik Lock* [2013] 1 LNS 539 where the court cited with approval a passage in *Williams on Wills*, 9th edn. (2008) as follows (para. 4.17):

> Old age, or the near approach of death at any age, lend straight to suggestions that the testator had no proper knowledge of the contents of the will, or that there was undue influence, or the suspicion arising from the fact that the will is largely in favour of the person drawing or procuring it. A desirable safeguard in such circumstances is for the will to be witnessed by a medical practitioner who satisfies himself as to the capacity

> and understanding of the testator and makes a record of his examinations and findings. This has been described as the "golden rule" although that is not, of itself a touchstone of validity, but only a means of minimizing disputes. It has been said that the grand criterion by which to judge whether the mind is injured or destroyed is to ascertain the state of the memory, for without memory the mind cannot act.

[12] In this regard, it is significant that the deceased did not have any history of any mental illness and the evidence overwhelmingly showed that he was rational and aware of his surroundings at the time of the making of the will and even well after he had done so. When the deceased suffered an injury to his forearm he went to see Dr Kek Kim Huat (DW1) on 26 May 2012. DW1 confirmed that the deceased was then alert, rational and conscious of his surroundings. He also saw Dr Saravanan Ramachandran (DW6) on 18 February 2013 with a complaint of respiratory infection. The deceased was also confirmed then to be alert and fully aware of his surroundings.

[13] In my respectful view, when there is no history of mental illness or lack of mental capacity, the presence of medical practitioners to confirm the mental capacity is not mandatory or necessary. As was asserted by the learned authors of *Williams on Wills*, it is only desirable for the sake of minimising disputes and not as a touchstone of validity.

[14] For these reasons, the claim of lack of testamentary capacity must fail.

Issue Of Suspicious Circumstances

[15] Now although there may be testamentary capacity the court has the power to pronounce against the will if the circumstances surrounding the making of the will excite suspicion such that there is serious doubt as to the validity of the will. The plaintiff here is alleging that there existed suspicious circumstances surrounding the making of the wills particularly the one dated 15 July 2011. As earlier alluded, the defendants bear the burden of dispelling any suspicious circumstances in the creation of the will.

[16] In *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90, the Court of Appeal expanded on the issue of suspicious circumstances as follows:

> If a will was prepared and executed under circumstances which raised a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. Another instance is where the person was active in procuring the execution of the will under which he takes a substantial benefit by, for instance, suggesting the terms of the will to the testator and instructing a solicitor chosen by that person.

[17] The plaintiff's main grouse with the will was that there had been unequal treatment in the will of the deceased's children and grandchildren. This was surprising as the plaintiff claimed that the deceased was like a father to him and there had never been a breakdown in their relationship. The deceased had been equally generous with all his grandchildren and the plaintiff himself was given a new Mercedes Benz E230 registration number ABY 919 as a graduation gift.

[18] The plaintiff further claimed that there was a change of testamentary direction after the deceased moved into the first defendant's house. Subsequently the plaintiff's share in the deceased's property had been reduced significantly from one-third (1/3) of the deceased's property and estate to a mere RM10,000 in the 2011 will.

[19] The plaintiff also claimed that when the deceased moved into the first defendant's house there occurred a creation of dependency in that the deceased depended upon the first defendant and his wife for his daily needs so much so that the deceased granted a power of attorney to the first defendant. It was submitted by the plaintiff that this dependency allowed the exercise of dominion and control by the first defendant and his wife which benefited the first defendant's family. This it was contended raised suspicious circumstances in the creation of the 2011 will.

[20] These contentions however overlook the fact that it was the deceased who chose to live with the first defendant. There is nothing sinister in this as the first defendant was the son of the deceased and he and his wife were in a position to look after all his needs. There is no evidence whatsoever that the deceased was unhappy with this arrangement. It was not the case that the deceased was kept confined in the first defendant's house. On the contrary, the evidence disclosed that on many occasions the deceased left the house to go to the park, to attend functions and even holidays with the family. I think the photographs adduced in evidence more than sufficiently attest to this state of affairs.

[21] What is also particularly noteworthy is that in all his dealings, the deceased had appointed his solicitor independently of any of the beneficiaries. The deceased alone instructed his solicitor and not any of the beneficiaries. The two lawyers that the plaintiff had dealt with, namely Mr SA Lingam and Mr Leuk Sing Yee (DW3) were not introduced by the first defendant or his family. The evidence also disclosed that the deceased was able to independently give instructions to his solicitor.

[22] For example, DW3, who had prepared the power of attorney and the transfer of a property to the first defendant, testified that the deceased was able to communicate very clearly what he wanted to do and he knew what he was doing. Later on the deceased also came to see DW3 to prepare a new

will but DW3 declined as he felt that it would be better for the deceased to go back to Mr SA Lingam who had prepared the previous wills for him. DW3's testimony as to what had transpired was as follows:

> I understand the client passed away but then if the court allowing this question I answer it. Yes there are a few things he wanted to know.
>
> Mr Foo basically he wanted to know like those previous wills he had made ok would it be valid if I make a new one with me, ok so I said the new one will invalided the previous one. These are a few things he discussed with me. So I said if that's the case you better since Mr SA Lingam has made a few wills for you its better for you to continue on with him. That's about it.

[23] The deceased then went to see Mr SA Lingam. What transpired in the solicitor's office is set out in the statutory declaration of Mr SA Lingam dated 10 February 2014 as follows:

> ... I wish to describe how I came to prepare and witness the will of Mr Foo Khoon Leong. On the 15-7-2011 sometime in the morning a couple came to my office and asked me if a 101 years old man can change a will. I told them that if this man can come and sit in front of me, tell me what he wants and I know what he wants, then I can prepare a will for him. The couple then went out and came with an elderly man, who walked into my office. I then told the couple to leave my room and I asked him what he wanted me to do for him. He spoke to me in English. I had a conversation with the gentleman and asked for his identity card and I noted down the details. I found that Mr Foo Khoon Leong to be of sound-mind even at his age of over 100 years old. The gentleman told me he wanted to change his will and he showed me a copy of a previous will made sometime in my office and he showed me a copy of an old will which I noticed was also made in my office and witnessed by me as one of the witnesses. I can't remember the exact date of that previous will. He told me he wanted certain clauses changed and instructed me to change those clauses. After taking the instructions I told him to come back later in the afternoon to sign the will. I then instructed my staff to type out the will as instructed by the Mr Foo Khoon Leong. When Mr Foo Khoon Leong came back in the afternoon I read the will back to him and he confirmed that it was correct. I then asked him to sign it and it was witnessed by my clerk and myself. ...

[24] The evidence of these solicitors does not suggest some grand scheme by the first defendant and his family to cart away the deceased's assets. Quite apart from the evidence of the solicitors, there was also evidence that the deceased was well able to handle his own personal matters like signing cheques, giving instructions to the bank, payment of income tax and making a police report. I do not think the deceased was in such a state of dependency that he could not act of his own free will and mind. By all accounts, the deceased appeared to be a strong-willed person with a mind of his own.

[25] Considering the evidence in his entity, I am unable to deduce any inference of irrationality or unusualness in the 2011 will such that there are suspicious circumstances. I think it was perfectly logical and reasonable for the deceased to have provided for the first defendant and his family to show his gratitude to them for looking after him. It is absurd to suggest that since they looked after him it must follow that when the will was changed in their favour it gave rise to suspicious circumstances.

[26] I think it would invite some scrutiny if the deceased testator had given his property to a complete stranger and not to the persons who had looked after him. With regard to the plaintiff, he or anyone else was also free to look after the deceased. In the end it was the first defendant's family which did that and to cast aspersion on them now is unwarranted as after all the first defendant is the son of the deceased. The deceased may have felt indebted to the first defendant's family and intended to provide for them. That cannot by any stretch equate to suspicious circumstances. It only reinforces what is a natural human instinct – to repay those who have been kind to us.

[27] There may be reasons as to why it was the case that little was provided to the plaintiff. Perhaps it was because the plaintiff was doing well financially or even that the deceased was unhappy with the plaintiff for not visiting him more regularly. It is difficult to say with any certainty what went through the mind of he deceased. He had a mind of his own and he acted on it. As was stated by the Privy Council in *Motibai Hormusjee v. Jamsetjee AIR* [1924] PC 28, at p. 33: "A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the court will not interfere with the exercise of his volition" (cited with approval in *Lee Ing Chin*, *supra*).

[28] In the upshot, I do not find any suspicious circumstances in the making of the 2011 will or the previous wills.

Issue Of Undue Influence

[29] The allegation of undue influence is asserted on the basis that there was an exercise of dominion and control by the first defendant and his wife. However, as I had indicated earlier, the evidence disclosed quite the opposite.

[30] The plaintiff relied on the case of *Choo Mooi Kooi v. Choo Choon Jin & Other Cases* [2012] 3 CLJ 477; [2012] 2 MLJ 691 to show there was undue influence. However, the facts in *Choo Mooi Kooi*'s case are vastly different in that there was strong evidence that the defendant in that case had orchestrated the whole episode of the making of the will to lay his hands on the deceased's assets. The testator in that case was also very ill and had impaired mental capacity. The defendant was very much involved in the making of the will and there was some doubt as to the veracity of the solicitor who prepared the will. Also, the testator had been kept away from other family members. There was no such evidence in the instant case.

[31] Considering all the facts and circumstances in this case, I am more than satisfied that the deceased at all material times had unimpaired mental capacity and was independent in his thinking despite his advanced age. My impression of the evidence was that that the first defendant or his family could not have had dominion or control over the deceased due to his strong character. In my assessment, the first defendant and his wife were quite subservient to the deceased. The deceased must have been a strict father to his children and someone who demanded obedience. This was obvious as even at his old age, the first defendant and his wife followed the wishes of the deceased as to whatever he intended to do. At its worst, they could have been motivated by a desire to please the deceased so that he will be kind to them in his will. However what stands out from the evidence is that the deceased had a mind of his own and acted independently in all his dealings without consulting the first defendant or his family.

[32] As I had opined earlier, it was highly likely that the deceased may have felt a sense of gratitude to the first defendant and his family for their kindness in looking after him but it cannot follow that this amounted to undue influence. Undue influence must involve some kind of pressure or influence such as to coerce the testator into doing that which he does not desire to do.

[33] In *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 1 LNS 340; [1998] 3 MLJ 457, Jeffrey Tan J (as he then was) set out the law relating to undue influence in a case involving the validity of wills in the following manner (at p. 578):

> Sir JP Wilde in *Hall v. Hall* (1868) LR 1 P & D 481 at p. 482 defined undue influence as follows:
>
> > Pressure of whatever character … if so exercised as to overpower the volition without convincing the judgment.
>
> Viscount Haldane in *Craig v. Lamoureux* [1920] AC 349 at p. 357 explained it as follows:
>
> > … Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which does not express his mind, but something else which he did not really mean.
>
> There is a difference between undue influence as understood in probate and in equity. In equity, persons standing in certain relationships to others are liable to have undue influence presumed against them in relationship to certain transactions. In probate, undue influence cannot be presumed (*Parfitt v. Lawless* (1872) LR 2 P & D 462 at p 468); 'there must be coercion … it is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence' (*Wingrove v. Wingrove* (1885) 11 PD 81 at p. 82).

A Undue influence is not bad influence but coercion (*Williams v. Goude* (1828) 1 Hag Ecc 577 at pp. 581, 596). Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded (*Parfitt v. Lawless* at p. 474). Appeals to affection, ties of kindred, gratitude for past services, or pity for future destitution are legitimate; but not pressure exerted to overpower the
B volition without convincing the judgment (*Hall v. Hall*). There is no undue influence unless the testator is in such a condition that if he could speak his wishes would say 'this is not my wish but I must do it' (*Baudains & Ors v. Richardson & Anor* [1906] AC 169 at p. 184).

Strictly, to upset a will, the undue influence must be shown to have been
C exercised in relation to the will itself. Where, however, there is evidence that the testator was so far under the influence of persons benefiting from his will that he was not a free agent, the conclusion may be warranted that undue influence was exercised in relation to the will, even if there is no direct evidence (*Boyse v. Rossborough* (1857) 6 HLC 2 at p. 51).

D Those alleging undue influence must prove it. It is not sufficient to show the circumstances attending the execution are consistent with its having been procured by undue influence. It must be show that they are inconsistent with any other hypothesis (*Boyse v. Rossborough* at p. 51]. Even if the power to overbear the will of the testator is admitted, it must be shown to overbear the will of the testator is admitted, it must be shown
E that such power was exercised, and the circumstances of the execution are inconsistent with any other view but undue influence (*Craig v. Lamoureux* [1920] AC 349]. Nevertheless in many cases in which the court has not been satisfied that there was undue influence, and even in cases where undue influence has been positively disproved, the court has pronounced against the will propounded because the circumstances have excited its
F suspicion and vigilance, and it has not been satisfied as to the righteousness of the transaction (*Barry v. Butlin* (1838) 2 Moo PC 480; *Fulton v. Andrew* (1875) LR 7 HL 448; *Re Harley, Hartley v. Fuld (Fuld intervening) (No 3)* [1965] 3 All ER 776).

[34] In the final analysis, it must also be appreciated that the court is not
G concerned with the fairness of the will. It is not the function of the court to ensure that a will was fair, equitable or just. It was up to a testator as to how he intended to dispose of his property so long as he acts with full comprehension of what he was doing.

[35] For these reasons, the claim on this ground is without merit and
H cannot succeed.

Conclusion

[36] In the circumstances, and for the reasons I have stated, it is my judgment that the deceased testator had testamentary capacity in the making
I of the wills and the defendants have successfully dispelled any suspicious circumstances surrounding the making of the 2011 will and the earlier wills.

[37] It is further adjudged that there was no undue influence on the part of the defendants in the making of the will such that they have taken advantage of the deceased testator. Accordingly, the plaintiff's claim is dismissed with costs assessed at RM30,000.

A

B

C

D

E

F

G

H

I